

DEPARTMENT OF STATE REVENUE

04-20140090.LOF

Letter of Findings Number: 04-20140090
Sales Tax
For Tax Years 2010, 2011, and 2012

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

ISSUE**I. Sales Tax - Liability.**

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-20; IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-1 et seq.; IC § 6-2.5-5-20; IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Indianapolis Fruit Co. v. Indiana Dept. of State Revenue, 691 N.E.2d 1379 (Ind. Tax Ct. 1998); Indiana Dept. of State Revenue v. Kimball International, Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); [45 IAC 2.2-2-1](#); [45 IAC 2.2-4-1](#); [45 IAC 2.2-5-43](#).

Taxpayer protests the imposition of sales tax on the sale of sandwiches, candy, and sodas.

STATEMENT OF FACTS

Taxpayer is a sole proprietorship which operates a convenience store which does not have fuel pumps. Taxpayer sold paper products, newspapers, candy, grocery items, sandwiches, soda, cigarettes, and other convenience store items. As a result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments of additional sales tax plus interest on the sale of sandwiches, candy, sodas, and paper products. Taxpayer protests the proposed assessment of additional sales tax on the sale of sandwiches, candy, and sodas. Taxpayer does not protest the proposed assessment of additional sales tax on the sale of paper products. An administrative hearing was held, and this Letter of Findings results. Additional facts will be supplied as necessary.

I. Sales Tax - Liability.**DISCUSSION**

Taxpayer protests the Department's proposed assessment of sales tax on the sale of sandwiches, candy, and sodas. All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). The issue before the Department is whether Taxpayer met her burden to prove the Department's assessment is incorrect.

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). The person who acquires property in a retail transaction is responsible for payment of sales tax on the transaction, but retail merchants collect the sales tax as agents for the state. IC § 6-2.5-2-1(b).

Retail transactions may be exempt if they fit the criteria of a statutory exemption. IC § 6-2.5-5-1 et seq. Exemption statutes are strictly construed in favor of taxation. Indianapolis Fruit Co. v. Indiana Dept. of State Revenue, 691 N.E.2d 1379, 1383 (Ind. Tax Ct. 1998). Whether a transaction qualifies for an exemption from tax is "highly fact sensitive," and it is the taxpayer's burden to prove the exemption criteria has been met. Indiana Dept. of State Revenue v. Kimball International, Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

The general rule is that "[s]ales of food and food ingredients for human consumption are exempt from the state gross retail tax." IC § 6-2.5-5-20(a). The term "food and food ingredients" is defined as "substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and that are consumed for their taste or nutritional value." IC § 6-2.5-1-20. "The term does not include alcoholic beverages, candy, dietary supplements, tobacco products, or soft drinks." Id. According to IC § 6-2.5-5-20(c), the term also does not include:

...

- (4) food sold through a vending machine;
- (5) food sold in a heated state or heated by the seller;
- (6) two (2) or more food ingredients mixed or combined by the seller for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses);
- (7) food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food);

...

Further, [45 IAC 2.2-5-43\(a\)](#) states:

Sales of food which ordinarily is sold for immediate consumption at or near the premises of the seller are taxable even though such food is sold on a "take-out" or "to go" order basis and is actually bagged, packaged, or wrapped and taken from the premises of the seller. Where and when the customer actually eats such food is immaterial. Accordingly, sales through a grocery store, salad bar, bakery, or delicatessen and by restaurants, cafeterias, lunch counters, drive-ins, roadside ice cream and refreshment stands, fish and chip places, fried chicken places, pizzerias, food and drink concessions, or similar facilities, of meals, sandwiches, hamburgers, hot dogs, french fries, fried chicken, fish and chips, pizza, potato salad, cole slaw, popcorn, sundaes, cones and cups of ice cream, milk shakes, soft drinks, and similar ready-to-eat food and beverage items are taxable regardless of whether sold by such establishments for consumption on the premises or on a "take-out" or "to go" basis.

The sales of sandwiches, candy, and soda are retail transactions subject to Indiana sales tax. See IC § 6-2.5-1-2; IC § 6-2.5-4-1; IC § 6-2.5-1-27; [45 IAC 2.2-4-1](#). The issue is whether Taxpayer's sales of sandwiches, candy, and soda are exempt from sales tax.

A. Sandwiches

The Department's audit found that Taxpayer sold sandwiches without collecting sales tax. During the protest process Taxpayer explained that the "sandwiches were frozen, microwavable ones purchased from [Vendor]." Taxpayer states that "[t]he customer picked their sandwich from the freezer and paid for it. They would use the microwave to warm the sandwich, or take it with them to heat later." Additionally, Taxpayer explains that she bought the convenience store along with its preprogrammed cash register. The preprogrammed register identified the sandwiches as non-taxable grocery items. Taxpayer did not receive training on the preprogrammed register.

If the sandwiches are sold frozen, are not prepared at or near Taxpayer's store, and they are not sold with utensils, then the sandwiches would be exempt from sales tax. However, Taxpayer has not provided any documentation to substantiate that this was the case other than her own explanation. Taxpayer has not met her burden to prove the Department's assessment of additional sales tax on the sale of sandwiches is incorrect, and Taxpayer's protest is respectfully denied.

B. Candy and Soda

The Department's audit found that Taxpayer sold candy and soda without collecting sales tax. During the protest process, Taxpayer explained that the preprogrammed register identified beverages as non-taxable grocery items. Taxpayer did not receive training on the preprogrammed cash register.

By statute, candy and soda (identified in the statute as "soft drinks") are not "food and food ingredients for human consumption." IC § 6-2.5-1-20; IC § 6-2.5-5-20(c)(1) and (c)(3). Because candy and soda are not "food or food ingredients for human consumption," the sales of candy and soda are not exempt from sales tax. IC § 6-2.5-5-20. Therefore, Taxpayer should have collected sales tax on her sale of candy and soda. Taxpayer's protest of the proposed assessment of additional sales tax on the sale of candy and soda is respectfully denied.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 08/27/2014 by Legislative Services Agency

